In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 273

JOHN M. KOSSICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 223 F. Supp. 720. The opinion of the court of appeals (Pet. App. 2a) is reported at 330 F. 2d 933.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1964 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 14, 1964. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's claim under the Federal Tort Claims Act was barred by the statute of limitations.

STATUTE INVOLVED

The pertinent provision of the Federal Tort Claims Act, 28 U.S.C. 2401(b), is set forth at page 9a of the petition.

STATEMENT

In his complaint, petitioner alleged that, in August 1950, while a patient at a United States Public Health Service Hospital in New York, he was the victim of medical malpractice (Pet. App. 2a). His course of treatment for the resulting injury continued through November 10, 1952, when he was discharged as fit for duty, and intermittently thereafter until February 1961.[1] This action, for the 1950 negligence of the doctors and nurses at the hospital, was not begun until April 4, 1963 (Pet. App. 2a).

The district court granted summary judgment for the United States, ruling that petitioner's action was barred by the two-year period of limitations provided in 28 U.S.C. 2401(b) (Pet. App. 2a). The court held (223 F. Supp. at 721) that federal law governs

[1] Petitioner's later visits to a Public Health Service outpatient clinic were for ailments unconnected with the malpractice (Pet. App. 6a).

and that the federal rule is that a claim accrues when the plaintiff discovers, or reasonably should discover, the acts giving rise to the claim.[2] The court noted (223 F. Supp. at 720) that, under the admitted facts in the case, petitioner was not only aware of the malpractice and of the nature and causes of his injuries at least as early as the Spring of 1951, but even then consulted an attorney about beginning an action to recover for the injuries.

The court of appeals affirmed, agreeing that federal law determines when a claim accrues within the meaning of section 2401(b) (Pet. App. 4a). However, the court also noted that, even under the law of New York, with its rule that a claim for malpractice does not accrue so long as the plaintiff is under "continuous treatment" for the ailment as to which the malpractice occurred, petitioner's action would still be untimely since the record showed that the last visit for treatment of his injury occurred more than two years before this suit (Pet. App. 6a).

ARGUMENT

This case does not warrant furthe review. Although there is a conflict between the circuits as to whether State or federal law determines when an action accrues within the meaning of 28 U.S.C. 2401 (b), the court below correctly ruled that petitioner's action was untimely under either view.

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[2] *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9). *Contra*, *Bizer* v. *United States*, 124 F. Supp. 949 (N.D. Calif.).

1. The court below followed the decisions of the Fifth and Ninth Circuits[3] and held that federal, rather than State, law determines *when* a tort claim against the United States accrues within the meaning of 28 U.S.C. 2401(b), even though (see 28 U.S.C. 1346(b)) one looks to State law to determine *whether* any claim accrues (Pet. App. 3a-4a). To be sure, this approach conflicts with that of the First Circuit in *Tessier* v. *United States*, 269 F. 2d 305.[4]

There appears to be no basis, however, for questioning the court of appeals' view that the action would in any event be barred under the law of New York. See, *e.g.*, *Borgia* v. *City of New York*, 12 N.Y. 2d 151, 237 N.Y.S. 2d 319, 187 N.E. 2d 777. This Court, of course, will "ordinarily accept the determinations of the Courts of Appeals on questions of local law * * *", *General Box Co.* v. *United States*, 351 U.S. 159, 165.

2. The fact that petitioner's remedy under the Tort Claims Act is time-barred by 28 U.S.C. 2401(b) in no way violates his constitutional rights, as he contends (Pet. 13-14); indeed, he has no right, in the absence of statute, to maintain any tort action against the United States. *Richards* v. *United States*, 369 U.S. 1, 6; *Dalehite* v. *United States*, 346 U.S. 15, 17.

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[3] *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9).

[4] Contrary to petitioner's suggestion, there is no conflict with *Richards* v. *United States*, 369 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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